

FEDERAL CIRCUIT COURT OF AUSTRALIA

WALIA v MINISTER FOR IMMIGRATION & ANOR

[2018] FCCA 1357

Catchwords:

MIGRATION – Review of Administrative Appeals Tribunal decision – Tribunal finding that it lacked jurisdiction due to late lodgement of the review application – interlocutory dismissal of show cause application – no arguable case of jurisdictional error.

LAW REFORM – Observations on the harsh consequences of the Tribunal’s inability to extend time limits and the complexity of those limits.

Legislation:

Federal Circuit Court Rules 2001 (Cth)

Migration Act 1958 (Cth), ss.5F, 66, 338, 347, 412, 494B, 494C

Migration Regulations 1994 (Cth)

Cases cited:

Ismail v Minister for Immigration [1998] FCA 1654

Rana v Minister for Immigration [2014] FCA 1233

Sherpa v Minister for Immigration & Anor [2010] FMCA 664

Singh v Minister for Immigration [2001] FCA 1710

SZJQC v Minister for Immigration & Anor [2008] HCASL 66

SZSKX v Minister for Immigration & Anor [2014] FCCA 157

Applicant:

SEHAJBIR SINGH WALIA

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

ADMINISTRATIVE APPEALS
TRIBUNAL

SYG 2574 of 2017

Judge Driver

25 May 2018

Sydney

25 May 2018

REPRESENTATION

The Applicant appeared in person

Solicitors for the Respondents: Ms A Davyskib of Minter Ellison

INTERLOCUTORY ORDERS

- (1) Pursuant to rule 44.12(1)(a) of the *Federal Circuit Court Rules 2001* (Cth), the application is dismissed.
- (2) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of \$3,667, in accordance with Item 2 of Division 1 of Part 3 of Schedule 1 to the *Federal Circuit Court Rules 2001* (Cth).
- (3)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 2574 of 2017

SEHAJBIR SINGH WALIA

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(Revised from Transcript)

Introduction and background

1. The applicant, Mr Walia, seeks judicial review of a decision of the Administrative Appeals Tribunal (Tribunal) made on 3 August 2017. The Tribunal found that it did not have jurisdiction in the matter due to the late lodgement of Mr Walia's merits review application.
2. Background facts relating to this matter are set out in the Minister's outline of submissions filed on 18 May 2018.
3. On 13 March 2014 Mr Walia, through his migration agent, applied for a partner (Temporary) (Class UK) (subclass 820) and partner

(Residence) (Class BS) (subclass 801) visa (partner visa).¹ The application nominated Mr Walia's wife, Lauren Ritchie (the sponsor) as his sponsor. Mr Walia and the sponsor had been married on 11 March 2014.

4. The application included a statement from Mr Walia² and one from the sponsor,³ their marriage certificate,⁴ two statutory declarations made by supporting witnesses in relation to Mr Walia's relationship with the sponsor,⁵ and other supporting documents.
5. On 23 September 2014 the Minister's Department wrote to Mr Walia inviting him to comment on information.⁶ That information related to Mr Walia's compliance with the criteria set out in Schedule 3 to the *Migration Regulations 1994* (Cth) (Regulations). Mr Walia was also invited to provide further information about his relationship with the sponsor.
6. On 24 October 2014 the Minister's Department received a response to that letter from Mr Walia's migration agent.⁷ The response attached statutory declarations from Mr Walia⁸ and the sponsor⁹ and a medical certificate dated 16 October 2014 stating that the sponsor presented with depression and anxiety.¹⁰
7. On 5 January 2015 a delegate of the Minister (the first delegate) refused to grant Mr Walia a partner visa.¹¹ The first delegate noted that Mr Walia's last substantive visa ceased on 30 September 2012. Mr Walia applied for a partner visa on 13 March 2014. The first delegate was not satisfied that Mr Walia was the spouse of the sponsor, as defined under s.5F of the *Migration Act 1958* (Cth) (Migration Act), in light of the matters set out in regulation 1.15A of the Regulations. The first delegate was therefore not satisfied that Mr Walia met subclause

¹ Court Book (CB) 1–52

² CB 47–48

³ CB 49–50

⁴ CB 51–52

⁵ CB 42–45

⁶ CB 61–66

⁷ CB 71–77

⁸ CB 73

⁹ CB 74–75

¹⁰ CB 77

¹¹ CB 78–114; esp. CB 88–114

820.211(2)(a)(i) of Schedule 2 to the Regulations, which required Mr Walia to be the spouse of the sponsor.

8. The first delegate then considered whether Mr Walia satisfied subclause 820.211(2)(d)(ii) of Schedule 2 to the Regulations, which in turn required Mr Walia to meet the Schedule 3 criteria. The first delegate found that Mr Walia did not meet criterion 3001 because the partner visa application was not made within 28 days of the relevant day, being the last day Mr Walia held a substantive visa (viz. 30 September 2012). The first delegate then considered whether¹² there were compelling reasons for not applying the Schedule 3 criteria. The first delegate was not satisfied that there were compelling reasons.
9. As Mr Walia did not meet clause 820.211(2)(a) and (d), the first delegate refused to grant Mr Walia a partner (Temporary) (Class UK) visa. Consequently the first delegate found that Mr Walia did not meet the criteria for the grant of a partner (Residence) (Class BS) visa, and also refused to grant Mr Walia that visa.
10. Mr Walia sought review of the first delegate's decision before the Tribunal (the first Tribunal). On 15 March 2016 the first Tribunal remitted the application for a partner visa to the Minister's Department with a direction that Mr Walia met clause 820.211(2)(d) of Schedule 2 to the Regulations.¹³ The first Tribunal was satisfied that there were compelling reasons for not applying the Schedule 3 criteria. That was because, at the hearing, Mr Walia provided oral and documentary evidence (in the nature of medical reports) that the sponsor's father was suffering from acute leukaemia.
11. On 5 July 2016 the Minister's Department wrote to Mr Walia inviting him to provide more information about his partner visa application.¹⁴ In response Mr Walia provided a number of documents, including photographs of Mr Walia and the sponsor.¹⁵
12. On 23 September 2016 a different delegate of the Minister (delegate) refused to grant Mr Walia a partner visa.¹⁶ The delegate was not

¹² Pursuant to subclause 820.211(2)(d)(ii)

¹³ CB 117–127; esp. CB 123–127

¹⁴ CB 132–143

¹⁵ CB 162–181

¹⁶ CB 182–209; esp. CB 186–209

satisfied that Mr Walia was the spouse of the sponsor, as defined under s.5F of the Migration Act, in light of the matters set out in regulations 1.09A and 1.15A of the Regulations. The delegate was therefore not satisfied that Mr Walia met subclause 820.211(2)(a)(i) of Schedule 2 to the Regulations, which required Mr Walia to be the spouse of the sponsor.

13. As Mr Walia did not meet clauses 820.211(2)(a) and (d), the delegate refused to grant Mr Walia a partner (Temporary) (Class UK) visa. Consequently the delegate found that Mr Walia did not meet the criteria for the grant of a partner (Residence) (Class BS) visa, and also refused to grant Mr Walia that visa.
14. The delegate's decision was sent by email to Mr Walia's migration agent at jbharati@hotmail.com,¹⁷ being the most recent email address for correspondence provided to the Minister's Department on behalf of Mr Walia in a "Form 956—Advice by a migration agent/exempt person of providing immigration assistance" form on 23 March 2016.¹⁸
15. On 19 October 2016 Mr Walia sought review of the delegate's decision before the Tribunal.¹⁹ That application was lodged by hand on 19 October 2016,²⁰ although the application itself was dated 17 October 2016.²¹
16. On 9 November 2016 the Tribunal wrote to Mr Walia inviting him to comment on the validity of the application, noting that the application to the Tribunal appeared to have been lodged out of time.²²
17. On 23 November 2016 Mr Walia, through his migration agent, responded to the invitation to comment, alleging that the application was filed with the Tribunal late due to financial hardship.²³
18. On 7 August 2017 the Tribunal found that it did not have jurisdiction.²⁴

¹⁷CB 182, CB 183, Annexure JDP01 to the affidavit of Julian D'Arcey Pinder made on 9 May 2018

¹⁸ CB 128–131; esp. CB 129 at [7]

¹⁹ CB 210–221

²⁰ CB 210; CB 220

²¹ CB 216; CB 218

²² CB 233–235

²³ CB 236–241

²⁴ CB 236–250; esp. CB 249–250

Tribunal decision

19. The Tribunal noted that the application for review to it was lodged on 19 October 2016.²⁵
20. The Tribunal further noted that, pursuant to s.347(1)(b) of the Migration Act and regulation 4.10 of the Regulations, an application for review of the delegate's decision had to be made within 21 days after Mr Walia was notified of the decision in accordance with the statutory requirements.²⁶
21. The Tribunal was satisfied, on the basis of the material before it, that Mr Walia was notified of the decision by email on 23 September 2016.²⁷
22. The Tribunal found that, pursuant to s.494C of the Migration Act, Mr Walia was taken to have been notified of the delegate's decision on 23 September 2016.²⁸ The Tribunal calculated the prescribed period within which the review application could be made to have ended on 14 October 2016.²⁹
23. As the application to the Tribunal was made on 19 October 2016 the Tribunal found that it was not made in accordance with the legislation and that the Tribunal did not have jurisdiction.³⁰

The present proceedings

24. These proceedings began with a show cause application lodged on 14 August 2017.
25. Mr Walia now relies upon an amended application filed on 13 November 2017. There are 13 grounds in that application:
 1. *Applicant claims that the Administrative Appeal Tribunal made a jurisdictional error when it did not consider the Appeal from the Applicant to consider the extension of time on an acceptable explanation for the delay for not lodging application within time limit of 21 Days .*

²⁵ CB 250 at [2]

²⁶ CB 250 at [3]

²⁷ CB 250 at [4]

²⁸ CB 250 at [6]

²⁹ CB 250 at [6]

³⁰ CB 250 at [6]–[7]

2. *It is a pre-condition to exercise of discretion in his favour that for extension show an " acceptable explanation of delay " and it is " fair and equitable in the circumstances" to extend time. (Duff at 485; Chapman v Rally, Neaves J.9 December 1983 not reported at 7)*
3. *The issue is that whether the applicant's explanation of circumstances for not paying prescribed fee of \$1673 at the time of application should be considered as acceptable and reasonable explanation for delay The applicant submitted every details the reasons for not lodging application by 19 October 2016 (Green Book PP236-42).*
4. *On 19 October 2016 the payment of \$1673 Dollor through Credit card was not accepted by the Commonwealth Bank. On 20 October 2016 ,applicant's friend paid the applicant's fee for lodging application for review.*
5. *The financial hardship was the main cause of delay . The father of sponsor (A Citizen) is under treatment for Cancer. The sponsor of the applicant is looking after her ill father. Father and mother of the sponsor is divorced . The applicant had casual job and did not have savings to organise application fee immediately .It took some time to organise money . The applicant borrowed money from friend who paid fee for the Applicant through his Credit card.*
6. *The delay was not more than five days . The applicant filed application on 19 October 2016 and time limit was on 14 October 2016. The applicant was requested to give reasons for delay and the applicant submitted a statement from the sponsor stating all the genuine reasons for delay in filling application for review .*
7. *It is believed the Tribunal will consider that the action taken by the applicant , other than making an application for review under the Act , is relevant to the Consideration of the question , whether an acceptable explanation of delay for the delay has been furnished ?*
8. *Background of the proceedings is that the applicant applied for the Partner Visa in 13 March 2014 .(Green Book pp 1-53) Department of Immigration refused on 5 January 2015 to grant Partner Visa .(Green Book P79)The applicant filed the application for review to the Administrative Appeal Tribunal and the Tribunal remitted the decision on 16*

March 2016 to the Department (Green Book Green Book PP 1118-1270) .

9. *In the Decision for remitting the decision of the Department , the Tribunal considered the changed circumstances "however, circumstances have changed. The Tribunal heard evidence that Ms Ritchie's father is suffering from Leukaemia. (Green Book PP 115-116) Discharge Referral - Gosford Hospital) The Tribunal was provided with medical reports to this effect . Due to severe nature of Ms Ritchie 's father's condition and obvious emotional turmoil associated with this the Tribunal considers that these Circumstances are a compelling reason not apply to Schedule 3 Criteria " The Tribunal is satisfied that there are compelling reasons for not applying the schedule 3 criteria. Accordingly, Mr Walia meets Cl .820.211 (2) (d) (ii) " (Green Book P 125)*
10. *On 23 September 2016 ,the Department of Immigration again Refused to grant the Partner Visa to the Applicant(GB 183-209) . The applicant filed application for Review to the Tribunal on 19 October 2016.*
11. *The present proceedings is relevant and a material factor . The delay in extension of time likely to prove harmful to the applicant and the sponsor . (Douglas at 19) . As the the sponsor is already suffering from emotional trauma because of his father illness, delay in the processing of Partner Visa will cause another cause of emotional breakdown to the Applicant and the sponsor.*
12. *The Applicant claims that the Tribunal made error when it did not consider merit of the applicant's case when deciding about the extension of time for the proceeding for the Partner Visa Review application. The Tribunal did not account the merit of the case during making decision for the extension of time . (Chapman V Reilly at 6)*
13. *The applicant claims that he has good prospect of success in this matter and they have genuine and continuing relationship with the sponsor , The Applicant claims he satisfies all the requirements for Partner Visa 820/801 . The first Respondent overlooked or mistook the facts and made decision on limited information without considering all the information and circumstances .*

(errors in original)

26. The original show cause application was supported by an affidavit by Mr Walia filed with it, which I received as a submission.
27. I have before me, as evidence, the court book filed on 3 October 2017 and the affidavit of Julian D’Arcey Pinder, made on 9 May 2018.
28. I explained to Mr Walia today that, while his grounds of review reasonably raise issues of concern relating to his circumstances leading to his late lodgement of his merits review application to the Tribunal, the essential difficulty he faces in this case is that the Tribunal lacked the power to extend time for that application.
29. The application was only five days late and Mr Walia has reasonable explanations for that short delay.
30. It appears that, once again, the inflexible regime within which the Tribunal operates which prevents it from extending time for a review application has worked an injustice. I have, on many occasions, over more than ten years, drawn attention to the harsh consequences of the inability of the Tribunal and its predecessors to extend time limits.³¹ While those calls for law reform have proved entirely fruitless, I make the same call today. Apart from the harshness of the inflexible legal regime, the various time limits prescribed under the Migration Act and the regulations are not only hard to follow but hard to fathom.
31. In relation to protection visa cases, s.412(1)(b) of the Migration Act and subregulation 4.312 of the Regulations together provide a time period of 28 days for seeking merits review. On the other hand, in relation to Part 5-reviewable decisions, s.347 appears, on its face, to prescribe a 28-day period, but this is modified by regulation 4.10 which provides a confusing array of time periods from as little as two working days to as much as 70 days. I see no logical reason for such a variety of time limits.
32. On the legal issue this Court must resolve, Mr Walia is unable to demonstrate an arguable case of jurisdictional error by the Tribunal. I agree with the Minister’s submissions on the legal issues.

³¹ See, for example, *SZSKX v Minister for Immigration & Anor* [2014] FCCA 157 at [17] and *Sherpa v Minister for Immigration & Anor* [2010] FMCA 664 at [39]

33. The allegations made in both the originating application and the amended application are falsely premised, as they assume that the Tribunal had the power to extend the statutory time limit for making a valid application to it. It did not.
34. The delegate's decision was a Part 5-reviewable decision within the meaning of s.338(2) of the Migration Act. An application to the Tribunal for review of a Part 5-reviewable decision (at least in relation to this class of visa in these circumstances) needed to be given to the Tribunal within the prescribed period, being 21 days commencing on the day the applicant was notified of the decision.³² The time period begins running when valid notification is given of the delegate's decision in accordance with s.66(2) of the Migration Act.
35. Based on the material before it, the Tribunal found that valid notification of the delegate's decision was given to Mr Walia in accordance with s.66(2) of the Migration Act on 23 September 2016.
36. The Tribunal was correct so to find. The evidence before the Court is that Mr Walia was notified of the delegate's decision by email sent on 23 September 2016 at 10.46am.³³
37. Mr Walia was therefore taken to have received the notification on 23 September 2016.³⁴
38. Mr Walia was therefore required to have made his application within 21 days of that date. The Tribunal calculated the last date on which to make a valid application to be 14 October 2016.
39. Mr Walia was therefore out of time when he lodged his application on 19 October 2016.
40. It is well settled that the Tribunal has no power to extend the time period for the lodging of a valid application for review to it, no matter how small the delay or compelling the circumstances, or whatever the reason for the default. As noted by Heydon J in *SZJQC v Minister for Immigration & Anor*³⁵ at [3]:

³² Section 347(1)(b) of the Migration Act and regulation 4.10(1)(a) of the Regulations

³³ Annexure JDP01 to the affidavit of Mr Pinder

³⁴ Sections 66(2), 494B(5) and 494C(5) of the Migration Act, and subregulation 2.16(3) of the Regulations

³⁵[2008] HCASL 66

There is no statutory power for the Tribunal, or anyone else, to extend the time limit, whatever the reason for the default.

41. Similarly, as found by Wigney J in *Rana v Minister for Immigration*³⁶ at [3]:
- ...the Tribunal has no discretion to extend the time within which an application can be made, or to otherwise waive the time limit or receive an application out of time.*
42. Even technical issues in the lodging of an application are irrelevant to the question of whether or not the Tribunal had jurisdiction.³⁷
43. It follows that the Tribunal did not have jurisdiction (as it correctly found), the Tribunal did not have any discretion or other power to extend the time limit for making a valid application, and the current application for judicial review must fail.

Conclusion

44. As the Tribunal decision was a legally valid one, only the Minister can change it. The injustice wrought by the inflexible and confusing legislative regime under which the Tribunal operates, can only be alleviated by the Minister. I will order that pursuant to rule 44.12(1)(a) of the *Federal Circuit Court Rules 2001* (Cth) (Federal Circuit Court Rules), the application be dismissed.
45. In consequence of the dismissal of the application, the Minister seeks an order for costs in accordance with the Court scale. Mr Walia indicated he may require time to pay. That is a matter in which he could raise with the Minister's Department.
46. I will order that the applicant pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of \$3,667, in accordance with Item 2 of Division 1 of Part 3 of Schedule 1 to the *Federal Circuit Court Rules 2001* (Cth).

I certify that the preceding forty-six (46) paragraphs are a true copy of the reasons for judgment of Judge Driver

³⁶ [2014] FCA 1233

³⁷ *Ismail v Minister for Immigration* [1998] FCA 1654 and *Singh v Minister for Immigration* [2001] FCA 1710

Associate:

Date: 29 May 2018